

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRAIG NELSON,	§	
	§	No. 368, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 9811012658
Appellee.	§	

Submitted: August 6, 2010¹

Decided: November 3, 2010

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 3rd day of November 2010, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The appellant, Craig Nelson, filed this appeal from the Superior Court’s May 19, 2010 denial of his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). The appellee, State of Delaware, has filed a motion to affirm the Superior Court’s judgment on the ground that it is manifest on the face of Nelson’s opening

¹ Four volumes of trial transcript not included in the record as submitted were filed on October 20, 2010 and reviewed by the Court as part of this appeal.

brief that the appeal is without merit.² We agree and affirm the judgment of the Superior Court.

(2) The record reflects that Nelson and a co-defendant were jointly tried in February 2000 on charges of attempted murder in the first degree, possession of a firearm during the commission of a felony, conspiracy in the first degree, recklessly endangering in the first degree and conspiracy in the second degree. The charges arose from a drive-by shooting at the corner of Fourth and Franklin Streets in Wilmington. Nelson and his co-defendant were convicted as charged.

(3) Luis Mercado, the alleged target of the shooting, testified that Nelson drove the vehicle from which the co-defendant fired a gun from a range of three to five feet. Mercado was struck twice, once in the abdomen and once in the arm. A second victim, Mercado's companion, was not injured.

(4) At trial, the State introduced evidence that Nelson and Mercado were rival drug dealers competing for territory around Fourth and Franklin Streets. The State's theory of the case was that the shooting was in retaliation for Mercado having snitched on one of Nelson's associates. In

² Del. Supr. Ct. R. 25(a).

his defense, Nelson denied that he was present at or involved in the shooting, and he argued that witnesses who testified otherwise were not credible.

(5) In his second motion for postconviction relief, Nelson alleged that the Superior Court's jury instructions on accomplice liability did not include an instruction under title 11, section 274 of the Delaware Code.³ Nelson argued that, under this Court's decision in *Allen v. State*, the Superior Court's failure to give an instruction under section 274 violated his right to a fair trial.⁴ The Superior Court denied Nelson's motion as procedurally time-barred without exception.⁵ This appeal followed.

(6) The Court has concluded that the Superior Court's denial of Nelson's postconviction motion should be affirmed. The *Allen* decision does not provide a basis to consider the motion as timely filed.⁶ Also, under the circumstances of this case, Nelson cannot demonstrate that the time-barred motion should be reviewed under an exception to the procedural bar. Simply put, the record, namely the Superior Court's jury instructions and trial transcript, does not support Nelson's claim that, had the Superior Court

³ See Del. Code Ann. tit. 11, § 274 (2007) (providing that when two or more persons are criminally liable for an offense which is divided into degree, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance).

⁴ *Allen v. State*, 970 A.2d 203 (Del. 2009).

⁵ *State v. Nelson*, 2010 WL 2006564 (Del. Super.).

⁶ See *Richardson v. State*, 3 A.3d 233 (Del. 2010) (holding that *Allen* did not announce a newly recognized, retroactively applicable right).

given an instruction under section 274, there is a reasonable probability that the jury verdict would have been different.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice